THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Administrative Law Judge

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Appellate Case No. 2025-000288

Walter Buchanon, Appellant,

v.

South Carolina Department of Environmental Services and
Silfab Solar, Inc. Respondents.

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF ENVIRONMENTAL SERVICES

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STATEMENT OF ISSUES ON APPEAL

1. Whether the S.C. Administrative Law Court ("ALC") properly dismissed Appellant's contested case hearing request as untimely.
2. Whether the ALC properly held that Appellant's challenge to a July 30, 2024, letter from the S.C. Department of Environmental Services ("Department" or "SCDES") to existing permittee Silfab Solar, Inc. ("Silfab Solar") did not present a contested case within the ALC's subject matter jurisdiction.
3. Whether the ALC appropriately deemed Appellant's failure to respond to Respondents' joint motion to dismiss as consent to dismissal.

STATEMENT OF THE CASE

This case considers whether the Administrative Law Court ("ALC") properly dismissed Appellant's request for contested case review of a letter sent by the Department to Respondent Silfab Solar, the holder of a previously issued air quality permit. (R. p. 55). This letter was sent electronically by the Department to Silfab Solar on July 30, 2024, through the Department's ePermitting system.

On August 14, 2024, Walter Buchanon, on his own behalf and on the claimed behalf of others in Fort Mill, York County, submitted a "Petition for Final Review" to the Department, seeking review of matters in connection with Silfab Solar's preexisting air quality permit and the July 30, 2024, letter. (R. p. 6; R. pp. 23-24). On August 16, 2024, the Department's General Counsel responded to Appellant's counsel, notifying him that the S.C. Department of Health and Environmental Control ("DHEC") had been abolished, and the review process previously available before the DHEC Board under S.C. Code Section 44–1–60 (2018) was no longer applicable. (R. p. 6; R. p. 22).

Appellant proceeded by submitting a contested case hearing request to the ALC, including a request form, attachments, and an "Agency Information Sheet and Notice of Appearance." (R. pp. 17-26). The form was dated August 29, 2024; however, the submission and filing fee were not documented as received by the ALC until September 9, 2024. (R. p. 6, n.4; R. p. 17; R. p. 134). While he did not provide a copy of the July 30, 2024, letter in question, Appellant indicated within his request form that he sought review of a "decision" dated July 30, 2024. (R. p. 17). Notably, the contested case request form was *unsigned*. *Id*. Additionally, the form omitted Appellant's identity and contact information (and identified only Appellant's counsel). *Id*.

Because the contested case request form lacked an original signature, the ALC's Clerk of Court ("Clerk") sent Appellant a memorandum noting the deficiency and returned the contested case hearing request form for resubmission with an original signature.[1] (R. p. 6; R. p. 134). After no response was received, the Clerk emailed Appellant an additional copy of the memorandum. (R. p. 30). The ALC received Appellant's signed, resubmitted request on October 5, 2024, perfecting the filing on that date.[2] (R. p. 6, n.5).

On November 27, 2024, the Department and Silfab Solar jointly moved to dismiss Appellant's contested case hearing request for lack of subject matter and procedural jurisdiction. (R. p. 60). Specifically, Respondents' motion explained that the July 30, 2024, letter in question was routine modeling correspondence and *not* a decision impacting any rights or duties subject to the requirement for a hearing. Thus, the letter did not present a "contested case" within the ALC's subject matter jurisdiction. (R. pp. 60-65). In addition, the motion proffered that, even if a contested case had been presented, the ALC lacked procedural jurisdiction because Appellant failed to submit a complete, timely contested case request in accordance with SCALC Rule 11 and S.C. Code Section 48–6–30(D)(2). (R. pp. 65-67).

Appellant filed no response to Respondents' joint motion to dismiss. (R. p. 4). The ALC did not hold a hearing on the motion.

On January 17, 2025, Chief Administrative Law Judge Ralph King Anderson, III, issued an order granting Respondents' Joint Motion to Dismiss on several grounds, including: (i) failure

[1] The Clerk also returned Appellant's "Agency Information Sheet" submittal as inapplicable to the Appellant (as opposed to the agency). (R. p. 6).

[2] The Clerk had stamped Appellant's deficient (unsigned) contested case hearing request upon receipt on September 9, 2024. Although the resubmitted, signed form retained the old filing stamp, the Order of Dismissal clarified that the filing was perfected upon receipt of the signed form on October 5, 2024. (R. p. 6, n.5).

to respond to the motion to dismiss; (ii) failure to present a contested case within the ALC's jurisdiction; and (iii) untimeliness. (R. pp. 4, 8-10). Appellant moved for reconsideration on January 2, 2025. (R. pp. 94-114). The Department and Silfab Solar filed written responses asserting no basis for reconsideration, alteration, or amendment of the ALC's Order. (R. pp. 115-120; R. pp. 121-130). The ALC denied reconsideration on January 17, 2025 (R. pp. 12-15), and Appellant's Notice of Appeal to this Court followed. (R. pp. 131-133, served on Feb. 14, 2025).

STATEMENT OF FACTS

A. Silfab Solar Permitting Background

In June 2023, DHEC (SCDES's predecessor agency) received an air quality permit application from Silfab Solar for the construction of a solar cell and solar panel production facility. (R. p. 69, ¶ 2). During the permitting process, Silfab Solar used air dispersion modeling to demonstrate compliance with ambient air quality standards for hydrochloric acid ("HCl") and hydrogen fluoride ("HF"), pursuant to S.C. Regulation 61-62.5, Standard No. 8, *Toxic Air Pollutants* ("Standard No. 8"). (R. p. 5; R. p. 69, ¶ 2). A draft of the permit underwent public notice and comment as required, and both a public meeting and public hearing were held. (R. p. 69, ¶ 2). On March 1, 2024, following the public notice process and Department review, the Department issued a construction permit (Permit No. CP-50000090 v. 1.0) ("Permit") authorizing the construction of solar cell and module manufacturing equipment and processes, associated chemical storage tanks, and an emergency generator in accordance with applicable state and federal requirements. (R. p. 4; R. pp. 69-70, ¶ 3 & pp. 72-85). To date, this is the only air quality permit that has been issued to Silfab Solar. (R. pp. 72-85).[3]

[3] Appellant intermittently references "a second April 17, 2024, permit" issued to Silfab Solar. *See*, *e.g.*, App. Br. at 2. The April 17, 2024, notification, however, was not a new permit or revision but simply correspondence confirming that the DHEC Board would not be conducting a final review

On March 13, 2024, pursuant to S.C. Code Section 44–1–60(E)(2) (2018), several community members filed a request for review of the issued Permit before DHEC's governing Board. (R. p. 5; R. p. 70, ¶ 4). On April 17, 2024, the DHEC Board notified the requestors in writing that it would not be conducting a final review conference in the matter, and the issued Permit became the final agency decision under S.C. Code Section 44–1–60(F) (2018). *Id*. The ALC did not receive any request for a contested case hearing within thirty days of the DHEC Board's notification that it would not be conducting a final review conference.

B. The Letter at Issue

On June 4, 2024, Silfab Solar informed DHEC that it would need to modify the proposed height of its emission stacks to ensure compliance with county requirements concerning building height. (R. p. 5; R. p. 70, ¶ 5). Condition I.1 of the Permit states in relevant part that "[a]ny changes in the parameters used in [the facility's air dispersion modeling] demonstration may require a review by the facility to determine continuing compliance with [the state and federal ambient air quality] standards." (R. p. 5; R. pp. 72-85). This language implements Section II(C) of Standard No. 8, which provides that "[c]hanges … in [modeling] parameters will require a review by the facility to determine if they have an adverse impact on the compliance demonstration." Accordingly, DHEC staff informed the facility that it would need to submit an updated air dispersion modeling analysis to verify that the changed stack height and any other changed modeling parameters would maintain compliance with applicable air quality standards. (R. p. 5; R. p. 70, ¶ 5).

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conference in response to the request for review of the Permit, thereby rendering that Permit the final agency decision. (R. p. 5; R. p. 70, ¶ 4).

Silfab Solar submitted updated modeling forms to the Department[4] on July 3, 2024. (R. p. 5; R. p. 70, ¶ 6). The submission included updates to stack height, stack diameter, and exit velocity parameters and accounted for two buildings being constructed nearby. *Id*. Regarding stack height, Silfab Solar had planned a stack height of 70 feet above the ground at the time of its permit application but nonetheless performed its original air dispersion modeling using a more conservative parameter of 19.7 feet above the ground. (R. p. 70, ¶ 6). Silfab Solar's July 3, 2024, modeling update changed the modeled stack height to 50 feet above the ground, reflecting the facility's updated plans to construct its stacks at that height.[5] *Id*.

The Department reviewed the updated modeling, as documented in its "Air Compliance Analysis Summary Sheet" ("Summary Sheet") dated July 22, 2024. (R. p. 5; R. p. 70, ¶ 7 & pp. 86-91). Per the Summary Sheet, Silfab Solar's updated modeling continued to show compliance with ambient air quality standards for HCl and HF. *Id*.

On July 30, 2024, the Department sent Silfab Solar the letter at issue. (R. p. 5; R. pp. 70-71, ¶ 8 & pp. 92-93). Appellant did not request in writing to be notified of the letter prior to it being sent. (R. p. 9, n.9; R. p. 71, ¶ 9). The majority of the Department's letter addressed Silfab

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[4] As of July 1, 2024, pursuant to S.C. Code Section 1–30–140, enacted under 2023 Act No. 60, all functions, powers, and duties of DHEC's environmental divisions, offices, and programs were transferred to, incorporated in, and shall be administered as part of SCDES. Accordingly, on July 1, 2024, the Department assumed administration of air quality permitting and oversight activities previously carried out by DHEC with respect to Silfab Solar (and all other air quality permittees). References in Appellant's Brief to either DHEC or SCDES administration of National Pollution Discharge Elimination System ("NPDES") permit programs are mistaken and inapplicable, as the NPDES program is a program for permitting sources of water pollution pursuant to applicable clean water statutory and regulatory authorities. *See* S.C. Code Ann. § 48–1–140(a) (referencing NPDES permits under the Clean Water Act).

[5] Appellant's Brief speaks of two changes to stack height. (*see*, *e.g.*, App. Br. at 4); however, only one stack height modeling parameter change was ever presented to the Department (*i.e.*, the change from the 19.7 foot (conservative) stack height parameter originally modeled to the 50 foot (updated actual) stack height parameter applied in the updated modeling). (R. p. 70, ¶ 6).

Solar's plans to install four boilers that were exempt from construction permitting—a matter unrelated to the facility's updated stack height and modeling. *Id*.[6] The letter then reiterated what was already documented in the Department's Summary Sheet—that the Department had reviewed the facility's updated modeling, and the analysis demonstrated continued compliance with air quality standards. (R. pp. 5-6; R. pp. 70-71, ¶ 8 & pp. 92-93). The letter also confirmed that because the modeling was submitted in accordance with Condition I.1 of the Permit, a permit revision was not required and was not being issued. (R. p. 6; R. p. 71, ¶ 10 & pp. 92-93).

STANDARD OF REVIEW

This Court's review is governed by the Administrative Procedures Act ("APA"). This Court may only reverse or modify an ALC decision where a petitioner's substantive rights have been prejudiced because a finding, conclusion, or decision is:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1–23–610(B)(a) – (f).

The jurisdictional issues in this case are largely questions of law subject to reversal only if decided "in violation of a statutory provision or … affected by an error of law." *Pickens Cnty. v. S.C. Dep't of Health & Env't Control*, 429 S.C. 92, 101, 873 S.E.2d 743, 748 (Ct. App. 2020), *aff'd*

[6] Regarding the four boilers, the letter acknowledges the Department's receipt of notification from Silfab Solar regarding its plans to install the boilers but adds that such notification was not required by regulation, and because the boilers were exempt under S.C. Regulation 61-62.1, Section II(B)(2)(b), no construction permit would be issued for them. (R. pp. 70-71, ¶ 8 & pp. 92-93).

in part, vacated in part on other grounds, 435 S.C. 99, 866 S.E.2d 537 (2021) (quoting *Kiawah Dev. Partners, II v. Dep't of Health & Env't Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014)).

This Court's review of the ALC's factual findings "must be confined to the record." S.C. Code Ann. § 1–23–610(B). "The [C]ourt may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." *Id*. To the extent facts are in question, the requisite standard is one of substantial evidence, meaning that "the Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC." *Kiawah*, 411 S.C. at 28, 766 S.E.2d at 715.

ARGUMENT

I. The ALC Properly Dismissed Appellant's Contested Case Request As Untimely.

In dismissing Appellant's contested case hearing request, the ALC ultimately concluded that it lacked subject matter jurisdiction. But this Court need not necessarily reach that issue, as the ALC also found that even if the July 30, 2024, letter were considered to present a contested case, Appellant's request for it to be heard was untimely under SCALC Rule 23(B) and S.C. Code Section 48–6–30(D)(2) because it was filed on October 5, 2024, more than 30 days after the July 30, 2024, electronic mailing of the Department's letter to Silfab Solar. (R. pp. 9-10, n.9). This basis for dismissal—which remains uncontested—squares firmly with the law and the facts of this case. Thus, consistent with Rule 220(c), SCACR, a decision affirming the ALC's dismissal on grounds of untimeliness is warranted.

A. Appellant has not disputed the ALC's holding of untimeliness.

Before addressing the merits of the ALC's decision on untimeliness, the Department reiterates that Appellant has not contested this basis for dismissal. Appellant did not file a response to Respondents' Motion to Dismiss before the ALC (R. p. 4), and his Motion for Reconsideration

did not reference the ALC's decision on untimeliness. (R. pp. 94-114). Appellant likewise has not briefed the issue before this Court.

"It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997) (citing *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993)). Such failure to challenge a ruling "is an abandonment of the issue and precludes consideration on appeal." *Id*. (quoting *Biales*, 315 S.C. at 168, 432 S.E.2d at 484); *cf. Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1998) (contentions raised for first time in oral argument or reply brief will not be considered by appellate court). Having not disputed the ALC's dismissal on grounds of untimeliness, Appellant must be deemed to have abandoned any argument to the contrary, and the ALC's dismissal on such grounds should be upheld accordingly.

B. Appellant failed to meet the statutory deadline for seeking ALC review.

It is clear under the applicable statutes and rules that Appellant failed to meet the required deadline for obtaining ALC review. The Department's enabling statute sets forth applicable procedures for "actions of the [D]epartment which may give rise to a contested case." S.C. Code Ann. § 48–6–30(A). Under these procedures, the Department must send notice of a reviewable decision to "the applicant, permittee, licensee, certificate holder, and affected persons who have requested in writing to be notified," and an affected person desiring to contest a reviewable decision must request a contested case hearing before the ALC within "thirty calendar days after the mailing of [the] decision." S.C. Code Ann. §§ 48–6–30(D)(1) and (D)(2); *see also* SCALC Rule 11(C) (stating generally applicable time limit, "[u]nless otherwise provided by statute"). This thirty-day statutory deadline controls.

Based on straightforward application of the law to the record before it, the ALC reached the manifest conclusion that even if, *arguendo*, the Department letter in dispute had been considered reviewable, Appellant did not meet the above thirty-day deadline. (R. p. 9, n.9). By affidavit, the Department established before the ALC that the letter was sent electronically to Silfab Solar through the Department's ePermitting system on July 30, 2024, and Appellant did not specifically request in writing to be notified prior to it being sent[7]. (R. p. 9, n.9; R. pp. 70-71, ¶¶ 8-9 & pp. 92-93). Appellant's contested case filing was not perfected until October 5, 2024, when Appellant resubmitted his contested case request with the required wet signature. (R. p. 6, n.5).[8]

This record leaves but one conclusion: were the Department's letter reviewable at all, the timeframe for filing a complete contested case request would have expired on August 29, 2024, thirty days after electronic mailing. The ALC's conclusion that Appellant's October 5, 2024, filing was untimely, thus, was not in error.

Neither the Department's enabling statute nor other law presents any basis for extending the deadline for seeking ALC review.[9] "Compliance with statutory time periods for filing appeals

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[7] In a footnote appearing in his Statement of the Case, Appellant makes a bare assertion that the ALC abused its discretion in "finding that 'petitioner did not specifically request, in writing, to be notified of the letter sent electronically July 30, 2024.'" App. Br. at 4, n.1. However, Appellant offers no support or explanation as to why he believes the finding to be an abuse of discretion and does not expressly dispute the finding itself. "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691-92 (Ct. App. 2001). Here, the ALC properly made its finding based on the substantial, uncontested evidence in the record, specifically, the affidavit submitted with Respondents' Joint Motion to Dismiss before the ALC. (R. p. 71, ¶ 9).

[8] As noted above, Appellant's contested case request was not filed until the required wet signature was supplied on October 5, 2024. (R. p. 6, n.5). Even the October 5, 2024, as-filed version of the contested case hearing request fails to strictly comply with the applicable ALC Rules, as the identity and contact information for the Petitioner were not stated, and the alleged decision being contested was not attached, per SCALC Rule 11(D)'s requirements. (R. p. 67; R. pp. 27-28).

[9] Were there any possible argument for tolling or otherwise extending this time limitation (the Department is aware of none), it was never raised by Appellant and therefore has been waived.

is a prerequisite for an appellate entity to have jurisdiction to hear an appeal." *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 380 S.C. 349, 376, 669 S.E.2d 899, 913 (Ct. App. 2008), *rev'd on other grounds*, 390 S.C. 418, 702 S.E.2d 246 (2010). This prerequisite is jurisdictional in nature, such that "an appellate body may not extend the time to appeal." *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188-89, 714 S.E.2d 547, 549-50 (2011). The ALC has consistently applied this principle to untimely contested cases. *See*, *e.g.*, *Moore v. S.C. Dep't of Health & Env't Control*, No. 19-ALJ-07-0162-CC, 2019 WL 4033953, at *3 (S.C. Admin. L. Ct. Aug. 16, 2019) (Lenski, J.) (citing *S.C. Coastal Conservation League*, 380 S.C. at 376-77, 669 S.E.2d at 913) ("[T]imely filing and service of a request for contested case hearing is a jurisdictional requirement and this court does not have the authority to extend or expand the time for filing."); *Carolina Bar Grp., LLC D/B/A/ TLC Sports Bar v. S.C. Dep't of Revenue*, No. 21-ALJ-17-0404-CC, 2022 WL 467835, at *2 (S.C. Admin. L. Ct. Feb. 8, 2022) (Anderson, J.) ("[A]n administrative agency is deprived of *procedural* jurisdiction if the appeal request is defective."). Thus, the ALC's "agree[ment]" that the untimeliness of Appellant's contested case request deprived it of jurisdiction was proper. (R. p. 9, n.9).

Appellant failed to meet the relevant time limit for seeking review. This Court need go no further to affirm the decision below. Rule 220(c), SCACR.

II. The ALC Properly Dismissed Appellant's Claims for Failure to Present a Contested Case within the ALC's Subject Matter Jurisdiction.

Appellant has at no point in the proceedings below or before this Court substantiated any claim to contested case jurisdiction for the Department's July 30, 2024, letter. Upon reasoned consideration of Respondents' Motion to Dismiss and the record facts, the ALC concluded that the

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See, *e.g.*, *Brown v. S.C. Dep't of Health & Env't Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (arguments not raised to and ruled on by ALJ not preserved for appeal).

Department's July 30, 2024, letter presented no contested case, and thus subject matter jurisdiction was lacking. Having appropriately applied the relevant laws and jurisdictional principles to the letter in question, this Court should affirm.

A. The Department's routine modeling correspondence was not a permit issuance or other decision giving rise to a contested case.

As recognized in the ALC's Order, the ALC, "as a creation of statute, only has those powers statutorily granted to it." (R. p. 7 (citing *S.C. Dep't of Consumer Affairs v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 186, 700 S.E.2d 468, 470 (Ct. App. 2010); *Responsible Econ. Dev. v. S.C. Dep't of Health & Env't Control*, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007))). The APA vests in the ALC the authority to hear "contested cases as defined in Section 1–23–505 [of the APA] or Article I, Section 22, Constitution of the State of South Carolina, 1895." S.C. Code Ann. § 1–23–600(A). In keeping with this overarching authority, the Department's enabling statute specifically grants the ALC jurisdiction to review "decisions of the [Department] involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, certificates, or other actions of the [D]epartment which may give rise to a contested case[.]" S.C. Code Ann. §§ 48–6–30(A), (D)(2).

In light of the above, ALC review is available only if the letter in question were to constitute a permit or other decision giving rise to a "contested case" under the APA or the South Carolina Constitution. The APA defines a contested case as a "proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22 [of the] Constitution of the State of South Carolina … to be determined by an agency or the [ALC] after an opportunity for hearing." S.C. Code Ann. § 1–23–505(3). Article I, Section 22 of the South Carolina Constitution provides, in part, that "[n]o person shall be finally bound by a quasi-judicial decision of an administrative agency affecting private rights except on due notice and opportunity to be heard." S.C. Const. art. I, § 22.

The ALC comprehensively considered whether the Department's letter would qualify as a permit or other decision giving rise to a "contested case" within the meaning of the above statutes or the Constitution. For the reasons detailed below, the ALC rightly concluded that it did not.

1. *The Department's routine modeling correspondence did not issue or modify a permit under the Department's enabling statute.*

The ALC correctly found that the Department letter in question "did not issue or modify Silfab's permit." (R. p. 8). As apparent on its face, the letter was merely a written response to Silfab Solar's submission of updated modeling data, documenting the Department's receipt of the updated modeling and that it verified compliance with the applicable standards. (R. pp. 92-93). The letter neither issued a permit nor altered the preexisting Permit. (R. p. 71, ¶ 10 & pp. 72-85). As recognized by the ALC, the Permit (Condition I.1) and underlying regulations (Standard No. 8, Section II(C)) expressly contemplate modeling parameter changes such as those undertaken by Silfab Solar, and they do so by "requir[ing] a review by the facility to determine continuing compliance with [the] standards" — not by way of any additional permit issuance or modification. (R. p. 85; R. p. 8). Having not issued or modified any permit, the letter cannot be said to give rise to contested case jurisdiction as a permit "issuance, denial, renewal, suspension, or revocation" under the Department's enabling statute. S.C. Code Ann. §§ 48–6–30(A), (D)(2).

2. *The Department's routine modeling correspondence did not give rise to a contested case under the APA.*

The ALC also properly concluded that the Department's letter was not a decision otherwise giving rise to a contested case under the APA. (R. p. 8). By the APA's definition, to give rise to a contested case, the Department's letter must, at minimum, be in connection with a "proceeding … in which the legal rights, duties, or privileges of a party are required … to be determined" by law

or by the S.C. Constitution after the opportunity for a hearing. S.C. Code Ann. § 1–23–505(3). The letter fails to meet this criteria.

First, the letter is but routine, ministerial correspondence to a preexisting Department permittee that does *not* reflect any proceeding or decision implicating "legal rights, duties, or privileges." The letter merely memorializes that the Department had reviewed what was submitted by Silfab Solar and that a construction permit was not required. (R. pp. 92-93). Acknowledging what was already made plain by the Permit (Condition I.1) and regulations (Standard No. 8, Section II(C)) did not convert the letter into a decision triggering third-party legal rights to contested case review. To conclude otherwise would be to render every routine modeling update the legal equivalent of a new permit, stripping the applicable regulations and Permit language of their meaning and effect and leading to an outcome unsupported by the APA's text.[10]

Second, no statute, regulation, or other law required the determination of any rights or duties in relation to Silfab Solar's modeling update. As the ALC found, the Permit and relevant portion of Standard No. 8 required only that the facility conduct a review to verify compliance. (R. p. 8). Our state Supreme Court has held that when no formal decision is required by law, the Department owes "no legal duty … to issue a staff decision …, which is the trigger to giving rise to a contested case …." *Amisub of S.C., Inc.*, 403 S.C. at 595-96, 743 S.E.2d at 797. Applying this principle to the letter in question, the ALC properly concluded that "[b]ecause Silfab's

[10] To construe such limited, technical reviews as decisions implicating third-party legal rights to a contested case would mean that countless other everyday reviews carried out by the Department—from reviews of test plans and test results, to reviews of facility reports, to reviews of operational plans, and much more—could be subject to contested case review, an implausible outcome. *See Amisub of S.C., Inc. v. S.C. Dep't of Health & Env't Control*, 403 S.C. 576, 596, 743 S.E.2d 786, 797 (2013) (finding against contested case jurisdiction where DHEC indicated that review could precipitate "an overwhelming number of contested case matters on everyday decisions that the General Assembly did not see fit to subject to … the contested case process").

submission of the updated air dispersion modeling analysis did not trigger a legal duty for the Department to review or issue a final decision regarding the facility review, the Department's July 30th letter cannot be described as a 'contested case' as defined under the [APA]." (R. p. 8).[11]

3. *The Department's routine modeling correspondence did not give rise to a contested case under the South Carolina Constitution.*

Article I, Section 22 of the South Carolina Constitution provides, in part, that "[n]o person shall be finally bound by a quasi-judicial decision of an administrative agency affecting private rights except on due notice and opportunity to be heard." S.C. Const. art. I, § 22.[12] Upon review, the ALC properly concluded that Appellant had no constitutional right to a contested case hearing.

First, as discussed above (Section II.A.2, *supra*), the letter in question was not a permit or other quasi-judicial "decision." The letter was routine correspondence documenting review of Silfab Solar's updated modeling, performed pursuant to express regulatory and permit terms and

[11] Appellant emphasizes the scale of the proposed change to the facility's stack height, characterizing the change as "major" and assuming it must "trigger[] a legal duty." App. Br. at 19, 20. It bears repeating that the relevant stack height change was one that *increased* the modeled stack height (from 19.7 feet to 50 feet above the ground), and therefore reflects improved emissions dispersion. (R. p. 70, ¶ 6; R. p. 65, n.6). In any event, as discussed above, because the stack height parameter change was allowed under the regulations and existing Permit, and because the updated modeling demonstrated compliance, the Permit has remained unchanged, and the Department was under no duty to issue any reviewable decision.

[12] Appellant's contested case request form filed with the ALC omits reference to Article I, Section 22 and instead claims Article I, Sections 3 and 14 as "[t]he constitutional basis" for ALC review. (R. p. 28). As noted by the ALC, Article I, Section 14 concerns the right to a trial by jury, a right which is not implicated in contested cases. (R. p. 8, n.7). While Article I, Section 3 addresses Constitutional due process, due process in the administrative context is more specifically addressed by Article I, Section 22. *S.C. Ambulatory Surgery Center Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 390-91, 699 S.E.2d 146, 152 (2010). Our state Supreme Court considers due process protections under Article I, Section 22 to be "the equivalent of those afforded by the Due Process Clause of our state and federal Constitutions." *Id*. at 391, 699 S.E.2d at 152. Thus, the ALC's consideration of any right to a contested case hearing applies equally whether evaluated under Section 3 or Section 22.

having no effect on the facility's preexisting Permit. As the ALC held, such a review "does not create a legal protected right" under the state Constitution. (R. p. 9).

In so holding, the ALC properly recognized that "the interests protected by the due process clause are not defined by the Constitution, but by independent sources, such as state law." (R. p. 9 (quoting *James Acad. Of Excellence v. Dorchester Cnty. Sch. Dist. Two*, 376 S.C. 294, 657 S.E.2d 469 (2008))); *see also S.C. Ambulatory Surgery Center Ass'n*, 389 S.C. at 392, 699 S.E.2d at 153 (quoting 16C C.J.S. *Constitutional Law* § 1516 (2010) ("[A]n interest in property which is protected by due process arises only when there is a legitimate claim of entitlement, as created and defined by independent sources, and a person clearly must have more than an abstract need or desire for it, and the person must have more than a unilateral expectation of it.")). As discussed above, the APA and governing air quality statutes and regulations do not confer upon Appellant any protected right with respect to Silfab Solar's updated modeling, and Appellant has identified no other independent source that would meaningfully support one.

Appellant's brief includes scant references to two sources from which he claims a legally protected right to review. Both are unavailing. Appellant first faults the ALC for "identif[ying] yet disregard[ing] the statutory provision granting … affected persons the right [] to challenge the issuance of a permit pursuant to section 48–6–30 …." App. Br. at 20. However, the ALC did not disregard this provision but found it inapplicable to the facts of the case, as "Silfab's permit was issued months prior to the Department's []letter and the terms of that permit expressly provide for the modeling parameter to be updated." (R. p. 9). Appellant also vaguely references county zoning requirements but does not explain how they establish any right to a hearing in this case. App. Br. at 20. They do not. However interested Appellant may be in the application of county zoning

requirements to Silfab Solar, that is a separate matter from any due process right to be heard in this case concerning Department air quality correspondence.

Finally, Appellant has no constitutional right to review of the Department's letter because he cannot claim any *private* right in relation to it. This state's jurisprudence distinguishes between a permit applicant "seeking review of the denial of a right to which it claims to be entitled" and "statutory affected persons," who "are not the type of litigants bound by an agency decision that article I, section 22 of the South Carolina Constitution was intended to protect." *Walterboro Cmty. Hosp., Inc. v. S.C. Dep't of Health & Env't Control*, 442 S.C. 154, 159, 898 S.E.2d 123, 126 (2024). The Department's letter to Silfab Solar concerning its air modeling does not bind the Appellant or affect his *private* rights. Appellant, thus, cannot claim any constitutional right to ALC review.

B. Appellant's remaining arguments express a desire for ALC review but provide no legal grounds for contested case jurisdiction.

It is difficult to discern with precision Appellant's claim to subject matter jurisdiction based on the brief submitted. As a threshold matter, the Department notes that Appellant's arguments in his brief were never presented to the ALC below and, thus, may be viewed as waived and not preserved. *Brown*, 348 S.C. at 519, 560 S.E.2d at 417. However, in the interest of clarifying the issues in this case, the Department responds below to some of Appellant's outstanding arguments and assertions, none of which establish any basis for finding contested case jurisdiction.

1. *Appellant's claims of procedural impropriety are unfounded and present no basis for ALC jurisdiction.*

Appellant argues that the record indicates "major changes after the March 1, 2024, Permit" and advances particular concern that the facility's stack height change and updated modeling were not disseminated to the public and were inconsistent with information shared during the original permitting process. App. Br. at 11-17. Appellant also claims that the facility's role in performing

updated modeling and demonstrating compliance improperly "usurp[ed]" the Department's own authority and reflected a shift following the agency's restructuring. App. Br. at 19.

Appellant's claims seeking additional notice or public process in conjunction with the facility's modeling update are procedural arguments on the merits, were the letter in question considered reviewable at all. These claims do not speak to the threshold question of jurisdiction, the only matter decided by the ALC and preserved for review by this Court.

Even if Appellant's claims were somehow relevant to jurisdiction in this case, Appellant cites no legal authority that would require any additional notice or process as regards to the letter (and the Department is aware of none). Having failed to adduce any authority in support of his claims that additional notice or process was required, they are properly deemed abandoned and provide no basis for modifying the decision below. *See*, *e.g.*, *Glasscock, Inc.*, 348 S.C. at 81, 557 S.E.2d 691-92 (conclusory claims made without supporting authority are deemed abandoned).

Moreover, records related to the facility's stack height change were not hidden. Appellant himself acknowledges he had "gleaned via FOIA requests" information not publicly noticed. App. Br. at 14. As discussed above, not every Department communication equates to a permit or other decision, and likewise, not every communication or matter before the Department necessitates formal public notice or public participation before the agency (indeed, not even all permits require public notice or a hearing[13]). Appellant's own desire for prior notice of the events in question does not effectuate any requirement that does not exist by law.

Finally, Appellant's claims that Silfab Solar's updated modeling somehow "usurped" Department authority are legally and factually without merit. As discussed above, Silfab Solar's

[13] *See* S.C. Code Ann. Regs. 61-62.1, Section II(N) (requiring public notice of permitting activity "[w]hen determined to be appropriate by the Department (or specified by regulation)").

modeling was performed pursuant to Standard No. 8 and Permit Condition I.1's express terms, and the Department reviewed the updated modeling and confirmed it showed compliance. (R. p. 5; R. p. 70, ¶ 7 & pp. 86-91). The agency restructuring in no way changed the governing regulations or Permit terms. Silfab Solar's actions merely implemented its own permit and regulatory responsibilities and reflected no delegation of Department authority.

2. *Any argument about the contested letter's discussion of exempt boilers is unpreserved for appeal and does not give rise to jurisdiction.*

Appellant's brief makes fleeting reference to four boilers exempt from construction permitting, a separate matter addressed in the Department's letter. App. Br. at 19. In his contested case request and accompanying exhibits, Appellant does not allege any factual or legal dispute in connection with the exempt boilers. (R. pp. 17-26; R. pp. 27-30). Likewise, assertions in Appellant's Prehearing Statement before the ALC regarding the nature of the proceeding and specific issues presented for determination identify Appellant's modeling concerns and make no mention of the exempt boilers. (R. pp. 31, 33-34). Even in his brief before this Court, Appellant characterizes his contested case request as a request for a hearing specifically "over … [modeling] 'parameters'—stack height, as well as stack width and exit velocities[.]" App. Br. at 21.

There being no stated dispute with the letter's discussion of the exempt boilers, Respondents' Joint Motion to Dismiss noted that any concerns about the exempt boilers were "considered by the Department to be outside the scope of this case" and added that, to the extent there were any claimed dispute regarding the boilers, subject matter jurisdiction was also lacking on that claim. (R. p. 57, n.2). As discussed above, Appellant did not file any response to the Department's motion.

To be clear, there is no basis for contested case review of the Department's letter as regards the four exempt boilers. S.C. Regulation 61-62.1 includes a construction permitting exemption

for "[b]oilers and space heaters of less than 10 million Btu/hr rated input capacity which burn only virgin gas fuels." S.C. Code Ann. Regs. 61-62.1, Section II(B)(2)(b). This specific exemption is also included, by regulation, "on a list of sources to be exempted without further review." *Id*., Section II(B)(3). Given these provisions, the boilers at issue were categorically exempt by application of law, not by any reviewable "decision" of the Department. The Department's acknowledgment of the exempt boilers in its response to Silfab Solar did not convert the matter into one implicating any right to contested case review. In any event, Appellant's failure to directly raise any concerns he had regarding the exempt boilers before the ALC is dispositive in this case. As the issue was not properly raised to or ruled upon by the ALC, the issue has been waived and not preserved. *Brown*, 348 S.C. at 519, 560 S.E.2d at 417.

3. *Arguments and concerns regarding Silfab Solar's underlying permitting are unsubstantiated, untimely, and outside the scope of this Court's review.*

Appellant's Brief claims various "misrepresentations" and other wrongdoing by the Department during the public participation process prior to Permit issuance and based on the content of the issued Permit itself. *See*, *e.g.*, App. Br. at 18-19, 22-23. Such claims concerning the underlying permitting of Silfab Solar in the first place—the core issue appearing to drive Appellant—present no grounds for reversal or modification of the ALC's decision.

First, generalized concerns regarding Silfab Solar's Permit and the process for Permit issuance do not render the specific July 30, 2024, letter in question a contested case. For there to be jurisdiction over the letter, the letter must in and of itself constitute a "decision" giving rise to a contested case and triggering a legally protected right to a hearing. S.C. Code Ann. §§ 48–6–30(A), (D)(2). Here, Appellant's concerns about the pre-Permit public participation process, VOC emission levels, and other aspects of the preexisting Permit are outside the scope of the record

below and establish no grounds for contested case review of the Department's distinct July 30, 2024, letter concerning updated modeling.

Second, Appellant's arguments fail to the extent they are intended as a claim to ALC jurisdiction over the preexisting Permit itself. Appellant's opportunity to seek ALC review in relation to the March 1, 2024, Permit has expired, as Appellant was required to raise any concerns he had about the Permit or processes relied upon for Permit issuance by availing himself of the available review channels at the time of Permit issuance. *See* S.C. Code Ann. §§ 44–1–60(E)(2), (G) (2018) (providing affected persons fifteen days from the date of Permit issuance to request review before the DHEC Board, and providing thirty days to seek ALC review upon mailed notice that the DHEC Board declined to hold a final review conference); S.C. Code Ann. § 1–23–380 (affording judicial review to a "party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case"); *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994) (a party who has failed to exhaust an adequate administrative remedy provided by statute is precluded from seeking relief before the courts). As noted above, the DHEC Board declined in writing to hold a final review conference regarding the Permit, and neither Appellant nor any other party sought review of the Permit before the ALC. (R. p. 70, ¶ 4). Having failed to exhaust available remedies for addressing concerns about the Permit, any attempt to piggy-back those concerns onto this challenge to the Department's distinct July 30, 2024, correspondence is foreclosed.[14]

[14] Notwithstanding the underlying Permit's unreviewability, the Department notes that Appellant's accusations of wrongdoing in regard to Permit issuance are also unsupported on the merits. DHEC's permitting of Silfab Solar, completed well before the correspondence at issue in this case, was carried out pursuant to specific authorities, including the *Pollution Control Act* (S.C. Code Ann. § 48–1–10 *et seq*.) and S.C. Regulation 61-62. DHEC implemented appropriate public participation procedures, putting a draft permit out for public notice and comment and convening both a public meeting and a public hearing. (R. p. 69, ¶ 2). The issued Permit comprehensively

III. The ALC Appropriately Deemed Appellant's Failure to Respond to Respondents' Motion to Dismiss as Consent to Dismissal.

At the outset of its Order of Dismissal, the ALC held that pursuant to SCALC Rule 19(A), Appellant's failure to respond to Respondents' Joint Motion to Dismiss would be deemed consent to the relief sought. (R. p. 4). Because the ALC proceeded with thorough consideration and resolution of the jurisdictional issues raised by the motion, this holding was not essential to the case's outcome but amplifies the grounds for dismissal.

Appellant nonetheless asserts that the ALC abused its discretion and committed an error of law in deeming Appellant to have consented to dismissal. App. Br. at 9. As set forth below, these claims are without merit.

A. The ALC appropriately applied SCALC Rule 19(A).

SCALC Rule 19(A)'s operative language, as in effect during the pendency of Respondents' motion, is straightforward: "Failure of a party to timely file a response may be deemed a consent by that party to the relief sought in the motion or petition." SCALC Rule 19(A) (2024).[15] Appellant filed no response to the motion. (R. p. 4). Thus, by application of the rule's plain terms,

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addresses applicable federal and state requirements, including requirements relevant to pollutants of concern to Appellant. (R. pp. 72-85 (full copy of Permit)). The agency's role in air permitting is to implement the relevant federal and state air quality standards and requirements, designed to protect public health and the environment, based on the permit application submitted. *See*, *e.g.*, S.C. Code Ann. Regs. 61-62(A). The agency is not involved in underlying zoning or facility siting decisions. If a permit applicant qualifies for an air quality permit, "a permit to construct … must be issued[.]" S.C. Code Ann. § 48–1–100(A). The implication that DHEC did not diligently carry out its authorities in permitting Silfab Solar under the relevant laws is unsubstantiated and without merit.

[15] The 2024 edition of the rules was in effect during the pendency and resolution of Respondents' motion, and this case is properly reviewed based on the rules in effect at that time. By revision, the SCALC Rule now omits the quoted language at issue. SCALC Rule 19(A) (2025). The new version, however, retains the threshold requirement that a party opposing a motion file a response, as well as the provision for ALC dismissal of a contested case based on noncompliance with applicable rules of procedure. SCALC Rules 19(A) and 23(B) (2025).

the ALC acted within its authority in "find[ing] that [Appellant's] failure to respond is deemed consent to the relief sought by Respondents." (R. pp. 4, 9).

In contesting this aspect of the ALC's decision, Appellant claims to have had a "vested right protected by the constitution" to present a contested case and asserts that this right improperly "t[ook] a backseat" to the application of SCALC Rules 19 and 23(B). App. Br. at 9. Appellant also stresses the rule's use of the word "may" rather than "shall." *Id*. at 10, 21. Neither argument presents any grounds for finding error or abuse of discretion.

First, the ALC's decision deeming Appellant to have consented to Respondents' motion did no prejudice to Appellant's rights as regards ALC review. Here, after thorough consideration of the issue, the ALC properly concluded that Appellant had no right to contested case review of the July 30, 2024, letter either under the South Carolina Constitution or under the APA. (R. pp. 8-9). With no underlying right to ALC review, Appellant's argument fails. Moreover, even in contested cases where subject matter jurisdiction is not in question, the mere existence of the threshold right to bring a contested case is not license to disregard procedural requirements for exercising that right. *Cf. Zaman v. S.C. State Bd. of Med. Exam'rs*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) ("One cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it."). Appellant's failure to respond to Respondents' motion was at his own risk, and the ALC's strict application of the rules' plain terms is not error or abuse of discretion.

Second, the permissive nature of SCALC Rule 19(A) in regard to consent does not render the ALC's exercise of its authority any error or abuse of discretion. On this point, it is notable that Appellant has never, either before the ALC or in the present briefing, offered any justification for not responding to the motion to dismiss. Moreover, while the ALC may have exercised discretion

in imputing Appellant's consent to Respondents' motion, Appellant's obligation to timely lodge its opposition to the motion was *mandatory*. *See* SCALC Rule 19(A) ("[I]f a party opposes [a] motion, the party *must* file a written response." (Emphasis added)). SCALC Rule 23(B) further permits the ALC to "dismiss a contested case or resolve the contested case adversely to the offending party for failure to comply with any of the rules of procedure for contested cases[.]"

In sum, the applicable rules plainly required Appellant to express his written opposition to Respondents' motion, or else risk an adverse decision. Appellant's interests in Silfab Solar and the contested letter do not override the ALC's authority in applying its procedural rules. The ALC appropriately applied the plain language of SCALC Rule 19(A) in deeming Appellant's non-response to Respondents' motion as consent.

B. The ALC's holdings imputing Appellant's consent and resolving the jurisdictional issues raised by Respondents are separate and stand independently.

Appellant faults the ALC for "engag[ing] in fact-finding and evaluating the weight of the evidence" on the jurisdictional issues raised by Respondents after having already imputed his consent to dismissal. App. Br. at 9-10. This argument presents no basis for relief on appeal, and Appellant cites no authority in support of his position. Here, several independent grounds for dismissal were raised, considered, and ruled upon. The ALC's consideration of the merits of the jurisdictional issues raised by Respondents' motion only reinforces the validity of the ALC's disposition of the case.

CONCLUSION

For the foregoing reasons, Respondent South Carolina Department of Environmental Services respectfully requests that the Court affirm the decision of the ALC dismissing Appellant's contested case hearing request for lack of jurisdiction.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Administrative Law Judge

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Appellate Case No. 2025-000288

Walter Buchanon, Appellant,

v.

South Carolina Department of Environmental Services and
Silfab Solar, Inc. Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

[Signature Page Follows]

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